IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

STATE OF MISSOURI *ex rel.* Joshua D. Hawley. Attorney General,	)	
Plaintiff,	)	Case No. 1516-CV16811
v.	)	
ZILL, LLC,	)	
Defendant.	)	

State's Brief on Financial Responsibility Mechanisms, Particularly Involving the Participation Agreement With The Missouri Petroleum Storage Tank Insurance Fund

The State submits this brief in response to the Court's order of February 9, 2017, which states: "Counsel for the State of Missouri is to submit a brief on financial responsibility mechanisms and the participation agreement involving the Petroleum Tank Insurance Fund by March 1, 2017." References to provisions of the Revised Statutes of Missouri are to the current versions, unless otherwise noted.

I. Financial Responsibility Mechanisms for Underground Petroleum Storage Tanks

A. An owner or operator of an underground petroleum storage tank must demonstrate evidence of financial responsibility for environmental cleanups, and damages to third parties for personal injury and property damage caused by leaks.

A federal regulation requires owners and operators of underground

petroleum storage tanks to "demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation petroleum underground storage tanks . . . ." 40 C.F.R. § 280.93(a). Missouri has adopted this requirement in § 319.114.1, RSMo and implementing rules promulgated by the Department of Natural Resources.[1] The Department's rules allow a tank owner or operator to use one or a combination of financial responsibility mechanisms: a cash trust fund, guarantee, surety or performance bond, letter of credit, and self-insurance. § 319.114.2, RSMo; 10 CSR 26-3.093(2) and -3.094. An owner or operator may participate in the Missouri Petroleum Storage Tank Insurance Fund (the "Fund") to satisfy part of the financial responsibility requirement. § 319.131.1, RSMo; 10 CSR

[1] The Department of Natural Resources promulgates rules to protect human health and the environment (§ 319.137, RSMo); but rules governing operation of the Fund are promulgated by a by a board of trustees created to manage the Fund. § 319.129.4, RSMo.

26-3.101.[2] Defendant Zill, LLC, is a Fund participant.

B. The Fund serves specific and limited purposes and the Fund's liability is not imposed upon the state.

The Fund was created as "a special trust fund … within the state treasury." § 319.129.1, RSMo. The legislative purpose was "to provide insurance to service station owners for the cleanup costs associated with spills and leaks from underground petroleum storage tanks." *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 743 (Mo. 2016). It "was created in an effort to limit environmental and public health hazards from leaking underground storage tanks." *Rees Oil & Rees Petroleum Prods v. Dir. of Revenue*, 992 S.W.2d 354, 356 (Mo. App. 1999).

The Fund is primarily financed by a surcharge, referred to as a "transport load fee," which is assessed on all petroleum transported into Missouri. The fee is collected by the Department of Revenue for deposit into

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[2] The Fund cannot satisfy all financial responsibility. Section 319.131.4, RSMo prohibits the Fund from paying the first $10,000.00 of cleanup costs, and imposes that liability upon the Fund participant. An applicant for participation in the Fund must demonstrate financial responsibility for the $10,000.00. 10 CSR 100-4.010(2)(E). This obligation is referred to as a "deductible." 10 CSR 100-4.010(5)(B)3.

the state treasury. § 319.132.1, RSMo. In addition, owners and operators of petroleum storage tanks who participate in the Fund pay a one-time fee of $100.00 with the initial application. § 319.129.2, RSMo. Thereafter, depending upon the construction of the Fund-insured tank, a participation fee of $100 or $125 is required upon each annual participation renewal by 10 CSR 100-4.010(3) – a rule authorized by § 319.133.2, RSMo.

Notwithstanding deposit into the state treasury, the Fund's moneys "shall not be deemed to be state funds" and shall not be transferred to general revenue at the end of each biennium." § 319.129.1, RSMo. The liability of the Fund is not the liability of the state, and its creation shall not be construed to broaden the state's liability beyond the provisions of §§ 537.660 - .610, nor to abolish or waive any defense that may be otherwise available to the state. § 319.131.4, RSMo. Conversely, the doctrine of sovereign immunity does not shield liability for obligations payable from the Fund. *River Fleets, Inc. v. Carter*, 990 S.W.2d 75 (Mo. App. 1999).

The Fund's liability is spelled out in § 319.131, RSMo, which generally authorizes "the Fund to pay its participants' cleanup costs and third-parties' claims involving property damage or bodily injury." *City of Harrisonville*, *supra*, at 751. "There is no authority for payment from the Fund for claims beyond those expressly articulated in section 319.131." *Id.* Section

319.132.4(4), RSMo specifically provides that moneys generated by the surcharge (the transport load fee) shall not be used for any purposes other than those outlined in §§ 319.129 - .133 and § 319.138, RSMo.[3]

C. A board of trustees administers the Fund.

The general administration and responsibility for proper operation of the Fund, including all decisions relating to payments from the Fund, are vested in a board of trustees, which includes certain state department heads and eight citizens appointed by the governor with the advice and consent of the senate. § 319.129.4, RSMo. Express statutory provisions empower the board to appoint an executive director and hire employees (§ 319.129.8); to prescribe rules as they relate to the fiduciary management of the Fund (§ 319.129.13); to assess and reassess the transport load fee, within certain limits (§§ 319.132.1 and -.4); and to annually assess the financial soundness of the Fund (§ 319.132.3).

The board may employ or enter contracts with persons experienced in insurance underwriting, accounting, the servicing of claims and rate making. The board is specifically authorized to employ or contract with "legal counsel

[3] For example, in addition to paying for cleanups and third-party damages, the Fund moneys may be used for operator training. § 319.130, RSMo.

to defend third-party claims." § 319.129.10, RSMo.

The board's powers are subject to an express limitation: "In no case shall the board have oversight regarding environmental cleanup standards for petroleum storage tanks." §§ 319.129.13, RSMo. That responsibility has been assigned to the Department of Natural Resources. §§ 319.109, -.125.3-.4, and §§ 260.500-.550, RSMo.

D. The board issues to each participant a form Participation Agreement.

To become a participant, an owner or operator of an underground petroleum storage tank must apply for coverage on a form specified by the board, provide certain information demonstrating compliance with technical standards promulgated by the U.S. EPA and spill-prevention standards by the Department of Natural Resources, and pay the required fees. § 319.131.3, RSMo; 10 CSR 100-4.010(2)-(3). Upon acceptance of the application, the board issues a document specifying the effective date of coverage, as well as terms and conditions that the board deems appropriate. With the document, the board issues a cover page that identifies the persons insured, the name and location of the business or operation where the tanks are located, and the specific tanks that are covered. 10 CSR 100-4.010(5).

Attached to this brief are samples of the "Underground Storage Tank Participation Agreement" (Exhibit 2) and the cover page (Exhibit 1), which is

titled "Declarations and Certification Endorsement for Financial Responsibility." Both samples are posted on the Fund's website at www.pstif.org. These documents are not published within the board's rules.

The opening paragraph of the Participation Agreement includes several caveats, including this statement:

> This policy is subject to applicable statutes and regulations of the state of Missouri, and any discrepancy between the terms and conditions of this policy and the statutes and regulations of the state of Missouri shall be resolved in favor of said statutes and regulations.

As the Court has been advised, after asking why the attempt at mediation failed, the parties encountered issues concerning the amount of money that is still available from the Fund to satisfy the claims. The issues arise from disagreement over statutory interpretation and whether there are discrepancies between Zill's Participation Agreement and state law.

II. Issues Involving the Fund that Affect this Case

A. How much money is initially available is a matter of disputed statutory interpretation.

Section 319.131, RSMo was amended in 2008, which raises the question whether the Fund's liability for the 2006 release is different from the Fund's liability for the 2015 release. The statute that was in effect at the time of the

2006 release can be read as establishing the Fund's exposure for that occurrence at three million dollars. Subsection 4 of § 319.131, RSMo Supp. 2001 capped cleanup costs at $1 million, less the participant's deductible. But subparagraph 5 arguably provided additional coverage with this language: "Coverage for third party bodily injury shall not exceed one million dollars per occurrence . . ." and further provided: "Coverage for third-party property damage shall not exceed one million." § 319.131.5, RSMo Supp. 2001. Therefore, the available moneys for the 2006 release, after the deductible, were arguably $3 million for a single release, that is, $1 million for each type of claim.

In 2008, § 319.131 was repealed and replaced, and this provision was included in the new version: "Total liability of the petroleum storage tank insurance fund for all cleanup costs, property damage, and bodily injury shall not exceed one million dollars per occurrence. . . ." § 319.131.5, RSMo. There is an argument that for the two releases combined, if the statutory provisions are different for each release, the maximum exposure to the Fund could be $4 million, less two deductibles.

But the Fund's board of trustees may believe that language of the current version of the statute was intended to clarify, not change, the legislative intent in 2001, and that the Fund's exposure has always been $1

million dollars per occurrence. That is how the board viewed the earlier version of the statute.

B. The board's assertions that the Participation Agreement reduces available cleanup moneys by Zill's legal defense costs arguably conflicts with § 319.129.10, RSMo and with federal and Department of Natural Resources rules.

Zill's counsel, who is paid by the board, has represented that the moneys available for cleanup and third-party damages is diminishing by his ever growing fees and expenses. This position is subject to challenge. Within the statutory authority given to the board is the ability to "select and employ . . . legal counsel to defend third-party claims. . . ." § 319.129.10, RSMo. This may be specific and limiting language, which does not authorize the board to hire legal counsel to fight an action brought by the state to enforce an order issued by the Department of Natural Resources to address a hazardous substance emergency under §§ 260.500-.550, RSMo.

But even assuming that the board may defend a participant from a state enforcement action to compel the participant to address a hazardous substance emergency, in the same vein as the board may defend against a third-party claim for personal injuries and property damage, there is still a question whether the board is nevertheless prohibited by federal and state regulations from offsetting legal defense costs against the available money for cleaning up the environment and third-party damages. The Department of

Natural Resources has promulgated a rule that provides: "The amounts of assurance required under this rule exclude legal defense costs." 10 CSR 26-3.093(7). This restriction also appears in federal regulation. "The amounts of assurance required under this section exclude legal defense costs." 40 C.F.R. § 280.93(g).

The term "legal defense cost" is defined by federal regulation as "any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought * * * [b]y EPA or a state to require corrective action" or by those asserting third-party claims for bodily injury or property damage. 40 C.F.R. § 280.92. The Department of Natural Resources, which is authorized by § 319.137.1, RSMo to adopt federal regulations by reference, has by rule adopted this definition. 10 CSR 26-3.092(1). Accordingly, under both state and federal law, as well as the caveat at the beginning of the Participation Agreement, there is an argument that moneys available for all claims must exclude the cost to the Fund of employing Zill's counsel in this case.

The terms of the Participation Agreement that limit available money in this case by offsetting legal defense costs may not be enforceable unless it is first promulgated as a rule, because the limitation arguably affects a participant's legal duties and restricts the participant's rights. Several cases

illustrate this point. *See Missouri State Div. of Family Services v. Barclay*, 705 S.W.2d 518 (Mo. App. 1985) (An income maintenance manual provision setting forth the method by which the Division computed the amount of a Medicaid recipient's income to be paid to a nursing home was a "rule" and void because it was not so promulgated.); *Tonnar v. Missouri State Highway and Transp. Com'n*, 640 S.W. 2d 527 (Mo. App. 1982) (The calculations in the Commission's right-of-way manual for determining compensation and relocation payments when properties were condemned for highway purposes could not be enforced because they were not promulgated as rules.) *NME Hospitals, Inc. v. Department of Social Services, Div. of Medical Services*, 850 S.W. 2d 71 (Mo. 1993) (A policy change disallowing costs of psychiatric services other than electric shock therapy from Medicaid reimbursement required promulgation of a rule, and until the policy was promulgated, it could not be enforceable by contract with health care providers.)

The point of rulemaking is to provide an opportunity for public notice and comment. And, of course, any rule must be authorized by statute and not in conflict with statutory authority. *Beverly Enters.-Missouri Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 349 S.W.3d 337, 347 (Mo. Ct. App. 2008) (holding that "An administrative agency enjoys no more authority than that granted by statute. Accordingly, regulations may be promulgated only to the

extent of and within the delegated authority of the statute involved.") (internal quotations omitted).

C. There are questions whether the board is lawfully offsetting certain expenditures against moneys available for the claims.

Finally, the board has suggested to the parties that moneys for the claims have been reduced by expenditures that the claimants consider questionable. For example, the parties to these cases are aware that the board has paid $300,000.00 to an entity called Urban Success, formerly known as South Roundtop Neighborhood. The payment was apparently negotiated with an attorney on behalf of a neighborhood group of persons who are not parties to this litigation, ostensibly for the redevelopment of an area that may have been adversely affected by the releases from Zill's tank. Because the litigants here are not privy to the details of how this money may be used, they cannot determine whether the expenditure is legitimately related to claims for third-party bodily injury or property damage. The State cannot presently consider the expenditure to be money used for cleanup because no plan for redevelopment of the area has not been presented to the Department of Natural Resources for a determination that it complies with the rules that govern environmental cleanup of a petroleum tank release.

On another matter, the State questions whether the board may reduce the amount of money available for corrective action by the cost of technical

reports that, from the perspective of the Department of Natural Resources, are not useful for cleaning up the contamination because they do not comport with the Department's regulations.

CONCLUSION

Mediation failed because the parties have not been able to resolve questions regarding the amount of money that is currently available from the Fund to satisfy the claims before the Court. The parties struggle with how these questions can be litigated.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet counsel for the parties of record.

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